OVERSEA-CHINESE BANKING CORP. LTD.

v.

KONSORTIUM UTAMA SDN. BHD.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[ORIGINATING MOTION NO. 25-4-89]
28 AUGUST 1989

LAND LAW: *Application to remove private caveat - Caveat lodged by contractors of land - Debts due from registered proprietor to contractors - Whether applicant chargee of land - A party aggrieved by the lodgment of the private caveat - Whether caveat should be removed.*

The applicant applied to Court for an order that the private caveat entered by the respondents be removed. The applicant contended that their rights as registered chargee of the land were affected. The charge was registered prior to the lodgment of the caveat by the respondents. The respondents, were appointed by the registered proprietor of the land, as contractors of a housing project on the land. The registered proprietor defaulted in payments due to the respondents. The respondents obtained judgment in default against the proprietor, which was subsequently set aside.

The question arose as to whether, the applicants, as chargee of the land was an aggrieved party by the lodgment of the private caveat.

Held:
Section 340 of the National Land Code provides that the interest of a chargee of land is indefeasible. Here, the applicant being a chargee of the land has an indefeasible interest and as such is a party aggrieved by the lodgment of the private caveat.

Cases referred to:
Eng Mee Yong & Ors. v. V.Letchumanan [1979] 2 MLJ 212
Registrar of Titles, Johore v. Temenggong Securities Ltd. [1976] 2 MLJ 44

Legislation referred to:
National Land Code 1965, ss. 320(1), 320(1)(b), 327, 340(1), (2)

For the applicants - Arthur Yeong Chong Sen; M/s. C.W. Chew & Co.
For the respondents - Tan Kok Guan; M/s. Tee, Tan & Partners

JUDGMENT

Abdul Malek Ahmad J:

The applicants had by way of notice of motion filed on 11 January 1989 on a certificate of urgency applied for an order that the private caveat lodged by the above-named respondents in the Registry of Titles, Ipoh on the whole of the parcel or piece of land held under HS[D] Ka. 3407/83 PT 46646 Mukim Hulu Kinta, District of Kinta (hereinafter "the said land") *vide* caveat presentation no. 3015/87 Jilid 505 Folio 23 be removed by the Registrar of Titles Ipoh by the cancellation of the entry thereof on the Register Document of the aforesaid title, costs and other relief on the grounds that as chargees of the said land by virtue of charge presentation No. 27507/83 Jilid 1570 Folio 27 registered on 29 October 1983 their interests had been affected. A search report on 10 October 1988 had revealed that a private caveat had been lodged on the said land by the respondents on 1 September 1987.

The applicants had also exhibited a letter showing that three sublots of the said land had been sold by the respondents to Yap Tim on 30 January 1986. The solicitors for the applicants had by letter dated 26 October 1988 demanded that the respondents withdraw the said caveat to which the respondents had failed to comply.

In their affidavit-in-reply, the respondents averred that they were appointed as contractors for Ban Long Cheong Sdn. Bhd. (hereinafter "BLC") on 28 October 1985 to undertake construction work on a housing project at Taman Pengkalan Baru, Ipoh. Consequently, BLC had defaulted in payments for the work undertaken and had agreed to contra the debt to the respondents through the sale of 10 units of houses. This promise was, however, not kept and the respondents had filed an action against BLC *vide* Ipoh High Court 22-67-88 and had obtained judgment-in-default on 18 April 1988. Hence the caveat.

As regards the sale to Yap Tim, the respondents allege that only RM60,000 of the RM235,000 had been paid for the 3 units of houses. The respondents contend that the applicants as chargees had been secured by the charge and that the presence of the caveat would not in any way alter the applicants' position or prejudice their interests in the said land. They also aver they were willing to remove the caveat once Yap Tim or BLC paid up the RM235,000 owed to them under the judgment-in-default obtained.

It is not disputed by both parties that the charge was registered on 29 October 1983 before the respondents lodged their private caveat on 1 September 1987. It is also a fact that the judgment-in-default obtained by the respondents against BLC on 18 April 1988 had been set aside on 5 May 1989 after arguments.

The only question is whether the applicants as chargees had been aggrieved by the private caveat lodged by the respondents in the said land under s. 327 of the National Land Code. In the celebrated case of *Eng Mee Yong & Ors. v. V.Letchumanan* [1979] 2 MLJ 212, the Privy Council had, in allowing the appeal, concluded that:

> In this case the onus was on the respondent, as caveator, to satisfy the Court that on the evidence presented to it his claim to an interest in the property did raise a serious question to be tried and having done so, he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action by preventing the caveatee from disposing of his land to some third party.

Lord Diplock, in delivering the judgment of the Board, had stated that:

> The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the Court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose. Their Lordships accept this as an apt analogy with its corollary that caveats are available, in appropriate cases, for the interim protection of rights to title to land or registrable interest in land that are alleged by the caveator but not yet proved. Nevertheless their Lordships would point out that the issue of a caveat differs from the grant of an interlocutory injunction in that it is issued *ex parte* by the Registrar acting in an administrative capacity without the intervention of the Court and is wholly unsupported by any evidence at all. Unless there were some speedy procedure open to the registered proprietor to get the caveat set aside in cases where the caveator's claim is baseless or frivolous or vexatious, the Torrens system of land registration and conveyancing, so far from giving certainty to title to land in Malaya, would leave the registered proprietor in a more precarious position as respects his powers of disposition of his land than an unregistered proprietor under English law.

Three years earlier, four of the five law Lords who heard the *Eng Mee Yong* appeal had considered on appeal from the decision of the Federal Court which had held that the Registrar's caveat was wrongly entered on the land whose registered proprietor owed the Federal Government overdue income tax. The Department of Inland Revenue, on hearing of the proposed sale of the land to the respondents, had requested the Registrar to enter the caveat on the land. When the application for transfer of title to the respondents was presented, the Registrar had accordingly rejected the documents because of the caveat. The High Court had dismissed the application to cancel the caveat and the Federal Court had allowed the appeal against that decision.

On appeal by the Registrar of Titles in *Registrar of Titles, Johore v. Temenggong Securities Ltd.* [1976] 2 MLJ 44, the Privy Council had held in the circumstances that:

> [1] although Malaysian income tax became due and payable by the taxpayer to the Federation, upon notice of assessment, its legal nature was that of an unsecured civil debt. Until it was converted into a judgment by the recovery of judgment in an action, the unsecured civil debt gave rise to no legal rights in or over any property of the taxpayer nor to any remedies against the taxpayer's property. It was a mere personal claim against him and did not come within the meaning of "interest" in s. 320(1) of the National Land Code;
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> 2] the interests which the Registrar of Titles was empowered to protect under s. 320(1)(b) were confined to interests in the land that were recognised by the Land Code as being either registrable or otherwise entitled to protection. An unsecured creditor of the proprietor of the land had no such interest in the land.

Section 340(1) and (2) of the National Land Code is abundantly clear. The relevant provisions read:

> 340(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible (the underlining is mine).
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> (2) The title or interest of any such person or body shall not be indefeasible:
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> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
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> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
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> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

In our case, not only are the applicants the chargee of the said land but the charge had been registered prior to the sale and purchase agreement of the respondents with BLC by letters dated 29 January 1986 for three houses costing RM235,000, 23 April 1986 for two houses costing RM156,000 and 24 April 1986 for five houses costing RM390,000. These three letters confirmed that the said amounts had been fully settled by the respondents to BLC as a set off for the RM976,000 owed to the respondents by BLC for the construction of 42 single storey terrace houses and 42 double storey terrace houses. The fact that three of the units had been sold to Yap Tim who had settled the amount in full had been illustrated by the letter of the respondents to BLC dated 30 January 1986. Consequently, I fail to understand how the director of the respondents by his affidavit filed on 3 May 1989 can aver that the

respondents would only remove their caveat if BLC or Yap Tim paid up the RM235,000 fully in the light of that letter. The same deponent had also admitted that his caveat could not get priority over the applicants' right as chargee.

Being the chargee with an indefeasible title and in the absence of any absence of any fraud, misrepresentation or forgery, the Court was satisfied that the applicants had been aggrieved by the subsequent lodgment of the caveat by the respondents, who have yet to obtain judgment against BLC, and accordingly I allowed their application with costs.

Also found at [1989] 2 CLJ 1251